ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN K. MAYES, Attorney General of the State of Arizona, et al., Defendants/Appellees, and ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants, DENNIS McGRANE, Yavapai County Attorney, Intervenors/Appellees.	No. CV-23-0005-PR Court of Appeals Division Two No. 2CA-CV-2022-0116 Pima County Superior Court No. C127867

PLAINTIFF-APPELLANT PLANNED PARENTHOOD ARIZONA, INC.'S RESPONSE TO FOUR AMICUS CURIAE BRIEFS IN SUPPORT OF INTERVENORS-APPELLEES

D. Andrew Gaona (028414)
agaona@cblawyers.com
Austin C. Yost (034602)
ayost@cblawyers.com
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5486

Diana O. Salgado*
diana.salgado@ppfa.org
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Ave. NW, Suite 300
Washington, D.C. 20005
T: (212) 261-4399
* *Admitted Pro Hac Vice*

Attorneys for Plaintiff-Appellant Planned Parenthood Arizona, Inc.

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Introduction

The four amicus curiae briefs filed in support of Intervenors-Appellees Dr. Hazelrigg and Dennis McGrane only reinforce the reasons why this Court should affirm the opinion below.

The Center for Arizona Policy ("CAP") and Speaker Toma and President Petersen ("Legislative Amici") argue that the court of appeals had no good reason to harmonize Arizona's abortion statutes because Arizona's near-total abortion ban (A.R.S. § 13-3603) ("Territorial Ban") unequivocally prohibits any "person" from performing an abortion. But CAP and Legislative Amici—like Intervenors before them—"refus[e] to consider the entire statutory scheme as a whole." *Planned Parenthood Ariz., Inc. v. Brnovich* ("*PPAZ*"), 524 P.3d 262, 267 ¶ 19 n.8 (App. 2022). They fail to acknowledge that other Arizona statutes regulating abortion, including A.R.S. § 36-2322 ("15-Week Law"), allow physicians to perform abortions under specific circumstances. Their reading would thus "criminalize conduct under one statute that our legislature has expressly allowed under another" and "render Title 36's regulation of elective abortion all but meaningless." *Id.* ¶ 19. The court of appeals rightly

rejected this effort to read the Territorial Ban in isolation and effectively erase scores of statutes in Title 36, including the 15-Week Law.

Having failed to find success under any statutory construction canon, CAP and Legislative Amici pivot and—like Intervenors before them—essentially ask this Court to throw its statutory interpretation principles to the winds. In this "highly litigious field" (CAP Br. at 3), with its unique historical "backdrop" (Legislative Amici Br. at 8), CAP and Legislative Amici urge this Court to defy its own precedent and the Legislature's intent to give all abortion statutes effect to fully revive the Territorial Ban. Nothing supports their remarkable request to adopt a brand-new, good-for-one-time-only standard to interpret Arizona's abortion statutes.

When the Legislature enacted the 15-Week Law, it made its intent plain in the session law. It intended to "restrict—but not to eliminate—elective abortions," *PPAZ*, 524 P.3d at 267 ¶ 16, and to not "[r]epeal, by implication or otherwise, [the Territorial Ban], or any other applicable state law regulating or restricting abortion," *id.* at 268 ¶ 22 (citation omitted). Whether abortion is "highly litigious" with a unique "backdrop"

or not, the court of appeals' decision tracks this legislative intent by reconciling all Arizona abortion statutes. This Court should affirm.[1]

Argument

I. Amici refuse to consider the entire statutory scheme.

CAP and Legislative Amici argue that the Territorial Ban's "plain language" resolves this case because there's "no conflict" between the Territorial Ban and any other Arizona abortion statute. CAP Br. at 12; Legislative Amici Br. at 5. Because the Territorial Ban prohibits any "person" from performing an abortion and a "person" includes a physician, they contend that the court of appeals overstepped when it exempted licensed physicians from the Territorial Ban's reach. *See id.*

Wrong. PPAZ already responded to this argument when Intervenors made it and thus incorporates its previous briefing here. *See, e.g.*, PPAZ Resp. to Pet. for Review at 10-13; PPAZ Supp'l Br. at 5-10.

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[1] The other two amicus curiae briefs also fail. The Arizona Life Coalition, the Frederick Douglass Foundation, and the National Hispanic Christian Leadership Conference advance purely policy preferences against abortion. Their arguments are irrelevant to the narrow statutory interpretation issue on review. And Mario Villegas asserts that fetuses are "persons" under the Arizona Constitution entitled to due process of law. But no party has ever made this argument, and "amicus curiae are not permitted to create, extend, or enlarge the issues." *City of Tempe v. Prudential Ins. Co. of Am.*, 109 Ariz. 429, 432 (1973).

To reiterate, CAP and Legislative Amici distort this Court's statutory interpretation principles beyond all recognition. This Court does not read statutes with tunnel vision. Or put another way, "'plain language' interpretation does not focus on statutory words or phrases in isolation." *Glazer v. State*, 244 Ariz. 612, 614 ¶ 10 (2018). Rather, words in statutes must be "read in context in determining their meaning." *Id.* (citation omitted). "And when statutes relate to the same subject matter," this Court construes them together "as though they constitute one law and attempt[s] to reconcile them to give effect to all provisions involved." *Fleming v. State Dep't of Pub. Safety*, 237 Ariz. 414, 417 ¶ 12 (2015).

The court of appeals followed these principles. It recognized that the Territorial Ban, "[c]onstrued in isolation," encompasses abortions "performed by licensed physicians." *PPAZ*, 524 P.3d at 266-67 ¶ 15. But that does not end the analysis. That's because the Legislature enacted newer statutes in Title 36 that plainly authorize licensed physicians to perform certain abortions. *See* A.R.S. § 36-2322(A) (a licensed physician "may not" perform an abortion "unless" specified circumstances exist); *see also, e.g.*, PPAZ Resp. to Pet. for Review at 12-13; PPAZ Supp'l Br. at 6-9

(explaining that this "may not" / "unless" structure reflects the allowance of otherwise-proscribed behavior when certain conditions are met).

CAP and Legislative Amici fail to grapple with the 15-Week Law's text. Yet the text is dispositive. It highlights the tension between the Territorial Ban and the 15-Week Law. And it shows that the Legislature established "a statutory scheme that, if read as [CAP and Legislative Amici] suggest[], would criminalize conduct under one statute that our legislature has expressly allowed under another." *PPAZ*, 524 P.3d at 67 ¶ 19. This would "effectively render Title 36's regulation of elective abortion all but meaningless because there would be no legal elective abortions." *Id.*

CAP and Legislative Amici's reading thus violates this Court's longstanding statutory interpretation principles that apply to all statutes in all areas regardless of whether those areas are "highly litigious" or have an interesting historical "backdrop." CAP and Legislative Amici ground their argument in their "refusal to consider the entire statutory scheme as a whole." *Id.* ¶ 19 n.8. But as the court of appeals explained, "we must adopt a reading that gives vitality to all the relevant statutes,"

including the 15-Week Law. *Id.* at 268 ¶ 19. The court of appeals did just that.

Harmonizing and giving as much effect as possible to all Arizona's abortion statutes also does not "implied[ly] repeal" the Territorial Ban, as Legislative Amici assert. Legislative Amici Br. at 1. The Territorial Ban remains on the books and a prosecutor may still enforce its prohibition against any non-physician who violates its terms. This means that the Territorial Ban and the 15-Week Law are both "operative" and neither is impliedly repealed. *S. Pac. Co. v. Gila Cnty.*, 56 Ariz. 499, 502 (1941).[2]

[2] Citing two out-of-state cases, Intervenors argue that a repeal may occur when a new statute "limits the scope" of an earlier one. Intervenors Supp'l Br. at 8. But neither court in the cases Intervenors cite interpreted a newer statute to impliedly repeal any part of an older statute. Instead, the courts harmonized statutes to make them both operative—just like this Court's precedent requires and just like the court of appeals did below. *See Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 198 P.3d 1109, 1119-20 (Cal. 2009) (a newer statute did not impliedly repeal an older statute because the statutes did not "even govern the same subject" and, in any event," they could be "rationally harmonized" such that "[b]oth [could] be given effect"); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (adopting an interpretation that "harmonizes the statutes" rather than impliedly repealing the older one).

II. Amici advance a construction contrary to legislative intent.

CAP and Legislative Amici next point to various legislative actions (or in CAP's case, legislative inactions) that they suggest support giving full effect to the Territorial Ban while emptying the 15-Week Law and other Arizona abortion statutes of any meaning. All these arguments fail.

First, Legislative Amici allege that the Legislature intended through the 15-Week Law to merely "supplement" the Territorial Ban until "such time as [the Territorial Ban] could be fully enforced." Legislative Amici Br. at 2. Hardly. The Legislature stated in the session law that it sought to "restrict"—not eliminate—"the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation." *PPAZ*, 524 P.3d at 267 ¶ 15 (quoting 2022 Ariz. Sess. Laws, ch. 105, § 3(B) (S.B. 1164)). And while Legislative Amici identify (at 10) the Legislature's statement that it did not intend to "[r]epeal, by implication or otherwise, [the Territorial Ban]," they misleadingly omit the rest of the sentence. The full sentence makes clear that the Legislature intended to not "[r]epeal, by implication or otherwise, [the Territorial Ban], or any other applicable state law regulating or restricting abortion." *Id.* at 268 ¶ 22 (quoting 2022 Ariz. Sess. Laws, ch.

105, § 2(2) (S.B. 1164)) (emphasis added). The court of appeals did exactly what the Legislature directed by harmonizing Arizona's abortion statutes and giving them as much effect as possible.

Legislative Amici's argument also fails because it's based on pure speculation about what the 31 individual legislators who voted to enact the 15-Week Law intended it to do. This Court, of course, routinely rejects parties' invitations to divine the subjective intent of various legislators. *See Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 ¶ 12 (2014) ("a legislator, lobbyist, or other interested party lacks competence to testify about legislative intent in passing a law"); *accord, e.g.*, *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 514 (1967). It has even more reason to decline to do so here given that no amicus even tries to claim that all these legislators intended to fully revive the Territorial Ban. CAP Br. at 6 (speculating that "many"—not all—legislators believed the Territorial Ban would become "fully effective").

If that weren't reason enough to ignore this argument, former Representative Joel John's amicus brief reveals that Legislative Amici do not accurately describe the intent of every legislator who voted for S.B. 1164. He, for instance, "did not share the intent attributed to the

legislative majority" in Legislative Amici's brief. Joel John Br. at 5. By voting for S.B. 1164, he agreed with its "text." *Id.* at 8. That text shows that the Legislature "permitted abortion by physicians *up to* 15 weeks, and thereafter prohibited abortion, subject to certain exceptions." *Id.*

Other government officials shared this understanding. After signing S.B. 1164, former Governor Doug Ducey publicly declared the 15-Week Law "[t]he law of the land." He said that it would "remain [the] law" even if the Supreme Court were to overrule *Roe v. Wade*, 410 U.S. 113 (1973).[3] Legislative Amici simply cannot establish that all the legislators who voted for S.B. 1164—and the Governor who signed it—shared the intent that Legislative Amici submit in its briefing. That's why this Court should focus on S.B. 1164's text and not Legislative Amici's speculative extra-textual gloss.

Second, CAP quibbles about the reasons the Legislature chose not to enact certain legislation to glean the Legislature's general views about abortion and says that these alleged "views" should somehow guide this Court's statutory interpretation. CAP Br. at 3-11. But this argument

[3] Howard Fischer, *Arizona Gov. Ducey: Abortion Illegal After 15 Weeks*, KAWC (Apr. 24, 2022), https://www.kawc.org/news/2022-04-24/arizona-gov-ducey-abortion-illegal-after-15-weeks.

similarly fails because it also rests on pure (and to CAP's credit, admitted) speculation about what specific legislators may or may not have intended. CAP Br. at 5 ("legislators likely concluded . . ."), 7 (in describing the Legislature's motivation, asserting that "[i]t seems more likely . . ."), 10 (guessing what legislators "probably thought") (emphasis added). This Court gives no weight to these groundless theories. *See, e.g.*, *Ariz. Citizens Clean Elections Comm'n*, 234 Ariz. at 325 ¶ 12.

More to the point, the narrow issue here is whether the court of appeals properly interpreted and reconciled all of Arizona's abortion statutes to give them as much effect as possible. Why the Legislature chose not to enact various other abortion statutes—especially when the 15-Week Law's text plainly permits certain abortions—doesn't move the needle on that question. CAP's argument is thus irrelevant.

Third, CAP suggests that harmonizing Arizona's abortion statutes violates A.R.S. § 1-219. CAP Br. at 13-14. According to CAP, A.R.S. § 1-219 requires courts to give effect to only the Territorial Ban because, were courts to give effect to all Arizona abortion statutes, there might be more abortions. This argument is as baffling as it is baseless.

For one thing, the Arizona District Court enjoined A.R.S. § 1-219 "as applied to otherwise lawful abortion care" because no one knows what it means. *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1247, 1253 (D. Ariz. 2022) (describing A.R.S. § 1-219 as "intolerably vague" and noting that Defendants said it's "anyone's guess" how the statute might be applied).

But even if someone could offer a coherent explanation about what A.R.S. § 1-219 does, CAP fails yet again to engage with this Court's precedent on statutory interpretation. The Legislature enacted A.R.S. § 1-219 at the same time it enacted a ban on abortions for reasons relating to a fetal condition or diagnosis, but before it enacted the 15-Week Law. This timing matters because CAP's argument would prevent a court from giving effect to the Legislature's newer enactment—the 15-Week Law. But had the Legislature intended for the 15-Week Law to mean nothing, it could have easily accomplished that outcome by never enacting the 15-Week Law at all. CAP's argument thus leads to absurd results.

In the end, CAP and Legislative Amici ask this Court to invent and apply a new standard that applies exclusively to abortion statutes. To justify this request, they offer only that abortion is a "highly litigious field" (CAP Br. at 3) with "unique circumstances" (CAP Br. at 11) and

"backdrop" (Legislative Amici Br. at 8). But whether true or not, the court of appeals did only what this Court's precedent requires by "adopt[ing] a reading that gives vitality to all the relevant statutes." *PPAZ*, 524 P.3d at 268 ¶ 19. That's especially so given that the Legislature expressed its intent when it enacted the 15-Week Law. It intended to "restrict—but not to eliminate—elective abortions," *PPAZ*, 524 P.3d at 267 ¶ 16, and to not "[r]epeal, by implication or otherwise, [the Territorial Ban], or any other applicable state law regulating or restricting abortion," *id.* at 268 ¶ 22 (citation omitted). CAP and Legislative Amici can't sidestep this intent by fabricating a new "highly litigious" and "unique circumstances" interpretive principle.

III. The court of appeals rightly read Arizona's abortion statutes in harmony to avoid arbitrary enforcement.

Legislative Amici also argue that the court of appeals was wrong to fear that Intervenors' proposed statutory interpretation would violate due process principles. Legislative Amici Br. at 11-16. They reason that the Legislature enacted "multiple criminal prohibitions governing the same course of conduct"—each of which is "clear." *Id.* at 13. And "uncertainty" in these prohibitions' enforcement does not violate due process. *Id.* at 12.

But this argument fails from the get-go because Legislative Amici's premise is wrong. Legislative Amici repeat Intervenors' argument, but no matter how many times they say it, we are still "not evaluating separate statutes prohibiting the same conduct." *PPAZ*, 524 P.3d at 267 ¶ 19. Rather, the 15-Week Law authorizes licensed physicians to perform certain abortions. *See* Argument I; A.R.S. § 36-2322(A). As a result, "we are faced with a statutory scheme that, if read as [Legislative Amici] suggest[], would criminalize conduct under one statute that our legislative has expressly allowed under another." *PPAZ*, 524 P.3d at 267 ¶ 19. This interpretation "would not merely invite arbitrary enforcement, it would practically demand it." *Id.* at 268 ¶ 20. That's because licensed "physicians performing elective abortions would not know if their conduct would be criminally prosecuted under [the Territorial Ban] or if they could avoid criminal liability by complying with Title 36." *Id.* ¶ 21.

In short, Legislative Amici's argument stems from their "refusal to consider the entire statutory scheme as a whole." *Id.* at 267 ¶ 19 n.8. Intervenors make the same mistake. But the court of appeals didn't. It read all Arizona's abortion statutes in context, as though they all make

up one law, and reconciled them to avoid rendering any unconstitutional. That's precisely what this Court's precedent demands.

Conclusion

Amici ask this Court to do what they couldn't accomplish through the democratic process. They want to fully revive the Territorial Ban, eliminate all elective abortions, and effectively delete a host of statutes in Title 36, including the 15-Week Law. But every statutory construction canon weighs against this position. The court of appeals rightly applied this Court's precedent to read Arizona's abortion statutes in harmony and give them as much effect as possible. This Court should affirm.

RESPECTFULLY SUBMITTED this 18th day of October, 2023.

COPPERSMITH BROCKELMAN PLC

By: /s/ D. Andrew Gaona
D. Andrew Gaona
Austin C. Yost

PLANNED PARENTHOOD FEDERATION OF AMERICA
Diana O. Salgado*

* *Admitted Pro Hac Vice*

Attorneys for Plaintiff-Appellant Planned Parenthood Arizona, Inc.